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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

STATE OF LOUISIANA
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
PETITIONER

VERSUS

ANTHONY R. WIEDEMAN, JR.
DERYL A. FALCON
ROGER AND MONA CONNER
DIXIE ELECTRIC MEMBERSHIP CORPORATION
MARK A. COSTON
ALLSTATE INSURANCE COMPANY
CANANDAIGUA WINE COOLER COMPANY, INC.
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Louisiana erred in its restrictive interpretation of 23 U.S.C. § 409 in holding that the statute protects only compilations while excluding reports and raw data gathered for or incorporated into such compilations?

PARTIES TO THE PROCEEDING

The parties to these proceedings are:

Anthony R. Wiedeman
Deryl A. Falcon
Dixie Electric Membership Corporation
State of Louisiana, Department of Transportation and Development
Mark A. Coston
Allstate Insurance Company
Canandaigua Wine Cooler Company, Inc.
Roger and Mona Conner

This application for a writ of certiorari is filed upon the behalf of the State of Louisiana thus Rule 29.1 with respect to corporations is inapplicable.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Court of Louisiana is reported at 627 So. 2d 170 (La. 1994). The judgment of the Louisiana First Circuit Court of Appeal denying writs is reported at 620 So. 2d 855 (La. App. 1st Cir. 1993). The ruling of the Twenty-First Judicial District Court for the Parish of Livingston, State of Louisiana, is not reported.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Louisiana was rendered on November 29, 1993. A petition for rehearing was denied on January 6, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

PERTINENT STATUTES

23 U.S.C. § 409:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

23 U.S.C. § 152:

> "(a) Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.
>
> (b) The Secretary may approve as a project under this section any highway safety improvement project.

(c) Funds authorized to carry out this section shall be available for expenditure on any public road (other than a highway on the Interstate System).

(d) Funds authorized to be appropriated to carry out this section shall be apportioned to the States as provided in section 402(c) of this title. Such funds shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b)(1), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by highway safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for highway safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement highway safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to,

the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

STATEMENT OF THE CASE

This action arises out of a motor vehicle accident occurring in Livingston Parish, Louisiana, on February 7, 1991, at the intersection of Louisiana Highways 64 and 1019. Plaintiffs, Anthony R. Wiedeman and Deryl A. Falcon, were riding a motorcycle westbound on Highway 64 and collided with a pickup truck owned by Dixie Electric Membership Corporation (DEMCO) and operated by Mark A. Coston, a DEMCO employee.

The accident occurred as Mr. Coston, eastbound on Highway 64, attempted a left-hand turn onto Highway 1019 northbound. It is disputed whether or not the motorcycle crossed the center line of Highway 64 into the eastbound lane of travel thus striking the DEMCO vehicle or, alternatively, whether Coston turned into the path of the oncoming motorcycle.

In the course of discovery, plaintiffs propounded a number of interrogatories and requests for production of documents to the Louisiana Department of Transportation and Development (DOTD) seeking to discover, among other things, all records

within the possession of DOTD reflecting previous traffic accidents at the intersection in question for a five year period, together with the actual police accident investigation reports for said accidents, average daily traffic counts, annual inspection and maintenance reports, and other miscellaneous design criteria. Additionally, plaintiffs sought copies of all lawsuits naming DOTD which involved accidents at the intersection in question.

DOTD objected, claiming the information sought to be within the protection of 23 U.S.C. § 409, specifically those records maintained by DOTD tracking the number of motor vehicle accidents at the intersection in question. DOTD argued said records are maintained solely for the purpose of identification and prioritization of intersections for modification which would be accomplished utilizing federal highway funds and pursuant to Title 23 of the United States Code.

Plaintiff moved to compel responses. The matter came on for hearing in the state trial court on December 7, 1992. At the hearing, a DOTD engineer, Maurice Jordan, testified that the information at issue would be used by the Department to identify high-risk intersections for possible improvement and should a modification be made, federal funding would be utilized. Mr. Jordan further testified, however, that no immediate plans for improvement of the intersection of Louisiana Highways 64 and 1019 were anticipated.

The trial judge ordered the production of much of the documents and information sought by plaintiff.

On February 26, 1993, DOTD applied for a writ to the First Circuit, Court of Appeal of Louisiana, which declined to exercise its supervisory jurisdiction. Subsequently, DOTD filed a

writ application to the Supreme Court of Louisiana as did the plaintiffs. On July 1, 1993, the Supreme Court granted both writs and consolidated the cases with *Roger and Mona Conner vs. Larry W. Laird, et al,* a case involving an intersectional collision in Lake Charles, Louisiana. In that matter, plaintiff sought to discover accident investigation reports for the intersection at issue and DOTD filed a motion *in limine* to exclude the same. The trial court granted DOTD's motion and plaintiff sought relief from Louisiana's Third Circuit Court of Appeal which denied the writ. Plaintiff thereafter sought a writ from the Louisiana Supreme Court which was granted and consolidated with *Wiedeman/Falcon* for oral argument. The cases were argued on October 19, 1993. On November 29, 1993, the Supreme Court issued its opinion ordering, in part, the production of documents as sought by plaintiffs. An application for rehearing by DOTD was denied on January 6, 1994, as was an application to stay the enforcement of the judgment on January 12, 1994.

On January 18, 1994, DOTD applied to Mr. Justice Antonin Scalia for a stay of the judgment of the Louisiana court pursuant to 28 U.S.C. § 2101(f) and Rule 23 of the Supreme Court. DOTD sought to stay the judgment of the Louisiana Supreme Court pending the filing of this writ application. The stay was denied on January 22, 1994.

The State of Louisiana, through the Department of Transportation and Development, has produced the information and documentation as ordered by the Louisiana court in *Wiedeman* and is now before this Honorable Court on writ application to address the claimed erroneous interpretation of federal law by the Supreme Court of Louisiana.

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Louisiana below represents an erroneous interpretation of federal law, 23 U.S.C. § 409, and conflicts with the opinions of other state and federal decisions interpreting the same statute. Moreover, Section 409 of Title 23 of the United States Code has been the subject of conflicting interpretations throughout the nation and direction is needed from this Honorable Court to ensure uniform and consistent application of the statute which, due to its preemptive nature, has a significant impact on civil litigation in state as well as federal tribunals.

A uniform application is particularly critical to those concerns, railroads for example, conducting operations in many jurisdictions and now subject to different interpretations of a single federal statute depending on the forum.

Unless and until this Court addresses the application of 23 U.S.C. § 409, the issues here presented will remain unsettled and will be the subject of diverse judicial interpretation throughout the United States.

The Highway Safety Act of 1973 is codified in 23 U.S.C. § 101, *et seq.* and provides for the acceleration and the construction of federal aid highway systems recognizing that many of these existing highways are inadequate to meet the needs of local and interstate commerce.

In connection with the implementation of the Act, and to secure federal funding for highway improvements, states have numerous responsibilities with respect to highway safety improvement programs including the identification, evaluation, planning, and implementation of projects in order to enhance the safety of potential accident sites within their respective jurisdictions.

As noted by the *Wiedeman* Court:

> Title 23 forms a part of a comprehensive plan to promote highway safety and to facilitate candor in the administration of highway safety standards. 627 So. 2d 170 at 173.

In order to foster the free flow of safety related information and to encourage candor, Congress enacted Section 409 which, in its earlier form, protected the admissibility of documentation generated by the states in compliance with Title 23.

An early test of Section 409 came from Louisiana in *Martinolich v. Southern Pacific Transportation,* 532 So. 2d 435 (La. App. 1st Cir.); writ denied, 535 So. 2d 745 (1988), where a Louisiana intermediate appellate court recognized the preemptive nature of the federal statute vis-a-vis state discovery rules but further noted the statute spoke only to admissibility rather than to discoverability.

In 1991, and subsequent to *Martinolich,* Congress amended Section 409 specifically to preclude the discovery of any information previously protected only from admissibility. Effective December 18, 1991, the statute now reads:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds **shall not be subject to discovery** or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or

> addressed in such reports, surveys, schedules, lists, or data." (Emphasis added)

The *Wiedeman* court, in an attempt to strictly and narrowly construe this preemptive statute, nevertheless transcends the bounds of statutory construction with an aberrant result.

The Louisiana Court effectively eviscerates Section 409 in restricting its scope to information which has been compiled "for certain purposes" 627 So. 2d 170 at 173 while yet permitting the discovery of the data collected by the Department in compliance with Title 23.

The Court noted:

> The word "compiled" indicates that information is collected into one document or composed from other sources. [*See Webster's New Collegiate Dictionary* p. 230, (1977).] The term suggests an end product, something more than unedited factual material. 627 So. 2d 170 at 173, (La. 1993).

Essentially, therefore, Louisiana's Court limits the protection of Section 409 to the ultimate end product rather than the entirety of the efforts of the State to comply with Title 23 in its identification, evaluation, planning and implementation of projects in order to enhance the safety of potential accident sites. The error of the Court is crystallized in the following language:

> Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations. 627 So. 2d 170 at 173.

This is an erroneous result particularly to the extent that data gathered specifically for the purpose of evaluation and prioritization pursuant to Title 23 is excluded from the

umbrella of protection. It is particularly egregious when Louisiana's Department of Transportation and Development has no other reason to receive and compile such information other than for the purposes of compliance with Title 23.

Thus, the inquiry is, "at what point in the evaluation process by a state of its roads, bridges and highways in compliance with Title 23 does Section 409 come into play?" When is it reasonable to assume that the process of evaluation and identification of hazardous sites will be protected under the mandate from Congress in Section 409?

To permit a plaintiff to discover data accumulated by the state, arguably not yet compiled into a single report, and thereafter to use said data in an attempt to prove notice of a dangerous condition at an intersection completely thwarts the intent of Section 409 in particular and, to a great degree, the purposes of Title 23 in its entirety. Such is the result of *Wiedeman* which is not in keeping with the weight of authority on this issue.

In *Robertson vs. Union Pacific Railroad Company,* 954 F. 2d 1433 (8th Cir. 1992), the United States Eighth Circuit Court of Appeal affirmed the exclusion of traffic counts, as well as a newspaper article addressing the dangerous nature of the railroad crossing at issue together with a formula used by the Arkansas Highway Department to evaluate railroad crossings in its state. The Court rejected plaintiff's contention that the data involved was beyond the protection of Section 409 as some of it may not have been collected or utilized solely for Title 23 purposes. Speaking to the issue of the introduction of data, the Eighth Circuit observed:

> The railroad asserts that the district court properly excluded the newspaper article from evidence, because

> "[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the statute." We agree. Appellants are not entitled to introduce evidence of otherwise inadmissible data simply because it is reported by an indirect secondary source. 23 U.S.C. § 409 provides a fairly broad exclusion: "reports, surveys, schedules, lists [and] data" compiled for safety enhancement purposes. 954 F. 2d 1433, 1435 (8th Cir. 1992).

In accord is *Lusby v. Union Pacific Railroad Company,* 4 F.3d 639 (8th Cir. 1993). *Wiedeman* is clearly contra to the United States Eighth Circuit as the Louisiana Court specifically ordered the production of traffic counts as well as other raw data.

In accord with the Eighth Circuit but at issue with *Wiedeman* is the United States Seventh Circuit in *Harrison vs. Burlington Northern Railroad Company,* 965 F. 2d 155 (7th Cir. 1992), in which the Court upheld the exclusion of a letter from the Illinois Commerce Commission to a railroad detailing the results of a report otherwise inadmissible.

The courts of last resort of Louisiana and Mississippi are not in accord. In *Sawyer v. Illinois Central Gulf Railroad,* 606 So. 2d 1069 (Ms. 1992), the Mississippi high court adopts a liberal interpretation more in accord with the U.S. Eighth and Seventh Circuits.

Before the *Sawyer* court on questions of admissibility were not only the hazard rank inventory of Mississippi relative to highway crossings but a letter detailing the dangers of the railroad crossing prepared some two years prior to the accident in question.

In excluding the inventory, the letter, as well as testimony concerning the same, the court noted:

Context is all important. A number of years ago, the federal government developed a program for enhancing the safety of railroad crossings across the country. The states were encouraged to participate under federal guidelines and upon compliance would receive ninety percent federal funding for such upgrade projects. Federal law and regulations directed the states to survey their circumstances and prepare data on crossings where safety improvements may be needed. To the end that candor might obtain regarding hazards that exist, the Congress acted to protect information developed in connection with the program from use in any civil litigation arising out of railroad crossing accidents. 606 So. 2d 1069 at 1073.

Further, *Sawyer* recorded:

Section 409 is one of the laws of the United States by which all judges of this state and the courts they serve are bound, notwithstanding anything in the constitution and laws of this state, having to do with rule making power, inherent authority, *Newell v. State,* or anything else.

Besides, nobody made Mississippi get into the railroad crossing safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program - in exchange for ninety percent federal funding - and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto. We have it on good authority that Missouri and Louisiana have rejected challenges to Section 409. *See Claspill v. Missouri Pacific Railroad Co.,* 793 S.W. 2d 139 (Mo. 1990); *Martinolich v. Southern Pacific Transportation Co.*, 532 So. 2d 435 (La. Ct. App. 1988). We accept Section 409 as controlling, as well. 606 So. 2d 1069 at 1073-1074.

Other jurisdictions are in accord. From Missouri is *Claspill v. Missouri Pacific Railroad Co.,* 793 S.W. 2d 139 (Mo.

1990), wherein the Supreme Court of Missouri excluded testimony of engineers concerning data compiled by the Public Service Commission and the Highway and Transportation Department in Missouri finding the testimony to be based upon documentation otherwise protected by Section 409.

A pre-amendment case, *Perkins v. Ohio Department of Transportation*, 584 N.E. 2d 794 (Oh. App. 10th District 1989), prohibits the admission of evidence of any accident which came to the attention of the Ohio Highway Department solely as the result of its programs operated pursuant to a federal hazard elimination program.

Another Missouri case, from the federal court, takes a broader approach than does *Wiedeman* in precluding the introduction of letters, correspondence, or internal memoranda relative to certain improvements or modifications at railroad grade crossings as being within the scope of Section 409. *See Hagerty v. Southern Railway Company*, 133 F.R.D. 34 (U.S.D.C., Mo. 1990).

A recent case from Arizona specifically addresses the issue of the protection of raw data versus compilations. In *Southern Pacific Transportation Company v. Yarnell*, 176 Az. 552, 863 P. 2d 271 (1994), the court held:

> The real parties in interest assert that "data" does not mean facts or raw data, but only means the written documents into which the data has been incorporated. That contention contradicts the plain language used by Congress. As the real parties in interest conceded at oral argument, "We're not reading the statute as it's written."
>
> Any other interpretation would render the statutory privilege illusory. Physical documents which contained data would be protected, but the data itself would not.

Any other meaning would also undercut the statutory purpose. Congress apparently intended to protect the process of making rail crossing safety decisions from outside scrutiny and interference. [FN2] With countless miles of rail lines and highways throughout the United States but only finite resources, improving safety is necessarily an ongoing process. Not every safety measure can be adopted at every rail crossing with a snap of the fingers. Congress thought that decision seeking to optimize the proper balance between safety and fiscal restraints would be best produced in a system free from intrusive second-guessing by civil tort actions, a system in which candid evaluations of highway safety hazards would flourish and information-gathering would be uninhibited. *Robertson v. Union Pacific R.R. Co.*, 954 F. 2d 1433, 1435 (8th Cir. 1992) (evaluations); *Perkins v. Ohio Dep't of Transp.*, 65 Ohio App. 3d 487, 584 N.E. 2d 794, 802 (1989) (information); *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So. 2d 1069, 1074 (Ms. 1992) (information).

*3 [2] [3] The clear weight of authority holds that data as well as documents are protected by the statute. In *Robertson v. Union Pac.*, the court upheld the exclusion [FN3] of rail crossing safety data, of a newspaper article based on such data, and of expert opinion testimony based on such data. The court held that introduction of data compiled for the purpose of highway and rail crossing safety enhancement was barred by "[t]he plain language of the statute." 954 F. 2d at 1435. Moreover, the statute also bars secondary sources—such as the newspaper article—because " '[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the statute.' " *Id.* (quoting district court). In short, both the documents containing data and the data itself are protected. 863 P. 2d, 271 at 274.

Finally, the *Yarnell* court noted:

The real parties in interest also contend that the data is discoverable because it might have been gathered for purposes other than federal safety programs. The record fails to reveal that the data was gathered for other purposes. More importantly, that fact would be immaterial even if it could be proved: The federal statutory language and purpose would still require that the data be privileged. In *Robertson v. Union Pac.*, 954 F. 2d at 1435 n. 3, the court held just such an argument to be "without merit."

The real parties in interest next argue that the statute does not protect data produced prior to the effective date of the 1991 amendment. Prior to that date, they contend, the statute barred admission of the data into evidence at trial but not its pretrial discovery. *See Martinolich*, 532 So. 2d at 439.

We reject this contention first because Congress intended all along to protect the data from discovery. The earlier version of the statute barred not only the admission of the data into evidence, but also its consideration "for other purposes." In our opinion, *Martinolich* misinterpreted the statute; the Congressional amendment clarified that the provision already extended the privilege to discovery materials rather than altering the privilege by expanding its scope. 863 P. 2d 271 at 275-276.

Although this Honorable Court has not yet addressed the definition of "compilation" in the context of a Section 409 case, we believe the issue is closely analogous to those Freedom of Information Act cases wherein this Court has been faced with a similar issue.

In *John Doe Agency v. John Doe Corp*, 493 U.S. 146, 100 S. Ct. 471, 107 L. Ed 2d 462 (1989), the United States Supreme Court faced the issue of the meaning of the term "compilation" with respect to the production of documents in

the context of a dispute arising out of the Freedom of Information Act, 5 U.S.C. § 552 and particularly the extent of (b) (7) (A) under the Act which precludes accessibility to documents compiled for law enforcement purposes.

While recognizing the purpose of the FOIA is to promote the free exchange of information, this Court nevertheless declined to narrowly construe 7(A) to exempt only those documents specifically prepared for a single purpose.

Writing for the Court, Mr. Justice Blackmun notes:

> The Court of Appeals, however, throughout its opinion would have the word "compiled" mean "originally compiled." See 850 F. 2d, at 109. We disagree with that interpretation for, in our view, the plain meaning of the word "compile," or, for that matter, of its adjectival form "compiled," does not permit such refinement. This Court itself has used the word "compiled" naturally to refer even to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. See *FBI v. Abramson*, 456 U.S. at 622, n.5, 102 S. Ct. at 2060, n.5; Reporters Committee, *supra.*
>
> Respondent, too, has used the word "compile" in its ordinary sense to refer to the assembling of documents, even though those documents were put together at an earlier time for a different purpose. In its FOIA requests of September 30, 1986, and February 3, 1987, respondent asked that the requested materials be furnished as soon as they were available, and that the response to the request "not await a compilation of all the materials requested." App. 21, 47-48. This was a recognition, twice repeated, that the documents having been compiled once for the purpose of routine audits were not disqualified from being "compiled" again later for a different purpose.
>
> We thus do not accept the distinction the Court of

> Appeals drew between documents that originally were assembled for law-enforcement purposes and those that were not so originally assembled but were gathered later for such purposes. The plain language of Exemption 7 does not permit such a distinction. Under the statute, documents need only to have been compiled when the response to the FOIA request must be made. 110 St. Ct. at pp. 476-477 (footnotes omitted).

As noted in the *Federal Bureau of Investigation v. Abramson,* 456 U.S. 626, 102 S. Ct. 2054, 72 L.Ed 2d 376 (1982), the term compilation has likewise been used to refer even to the process of data gathering. The Court in that case, also considering Exemption 7 of FOIA, held that information which was originally compiled for law enforcement purposes did not lose its Exemption 7 protection if summarized in a new document not created for law enforcement purposes.

A narrow construction of 23 U.S.C. § 409 so as to permit discovery of all documentation collected and compiled by DOTD, albeit not in a final survey or prioritization of hazardous roadways is not in keeping with the intent of the statute; to promote highway improvement and, thus enhance public safety by precluding the possibility that such information later would be available to litigants in civil suits. *Perkins v. Ohio Department of Transportation, supra.*

CONCLUSION

We believe the issues here presented deserve consideration by this Court pursuant to Rule 10.1 (b), and (c). Section 409 of Title 23 remains the subject of confusion and inconsistent result and for the reasons as set forth herein it is respectfully requested and prayed that this Honorable Court review the decision of the Louisiana Supreme Court below.

Respectfully Submitted:

SEALE, SMITH, ZUBER & BARNETTE

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April 5, 1994

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APPENDIX A

NOV. 29, 1993

SUPREME COURT OF LOUISIANA

NO. 93-CC-1314

ANTHONY R. WIEDEMAN, JR.

versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL

c/w NO. 93-CC-1318

DERYL A. FALCON

versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION

c/w NO. 93-CC-1352

ROGER CONNER AND MONA CONNER

versus

LARRY W. LAIRD, ET AL

ON WRIT OF REVIEW TO THE COURTS OF APPEAL, FIRST AND THIRD CIRCUITS, STATE OF LOUISIANA

WATSON, Justice.[1]

In these consolidated cases, three plaintiffs injured in two motor vehicle accidents brought suit against the Department of Transportation and Development [DOTD]. At issue is interpretation of a federal statute, 23 U.S.C. § 409, which bars discovery and introduction into evidence of highway safety information compiled by the State.

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[1]Pursuant to Rule IV, Part 2, § 3, Calogero, C.J. was not on the panel which heard and decided this case. See the footnote in *State v. Barras*, 615 So.2d 285 (La. 1993).

FACTS

On May 23, 1989, Roger Conner's automobile struck a turning vehicle at the intersection of Gauthier Road and Lake Street in Lake Charles, Louisiana. Conner was severely injured and brought suit alleging, *inter alia,* that the intersection posed an unreasonable danger to motorists. During discovery, Conner obtained from DOTD traffic flow studies, traffic counts, accident reports and other reports and evaluations concerning the accident site. Conner sought to use the traffic studies and accident reports to show that the intersection warranted a four-way stop sign or signal because of traffic volume and accident frequency. The DOTD filed a motion *in limine* objecting to the documents' introduction into evidence. The trial court excluded the evidence pursuant to 23 U.S.C. § 409 which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or state court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such report, surveys, schedules, lists, or data.

As originally enacted in 1987, § 409 addressed only *admissibility* of evidence. In 1991, Congress amended the statute to preclude *discovery* as well. 23 U.S.C.A. § 409 (West Supp. 1993) (effective December 18, 1991).

In a Livingston Parish intersectional collision on February 7, 1991, Anthony R. Wiedeman and Deryl A. Falcon were injured when a left-turning vehicle struck their motorcycle at the intersection of Louisiana Highways 64 and 1019. They sued DOTD, claiming that the intersection was defectively designed or, alternatively, inadequately signed or signaled. Plaintiffs propounded a number of interrogatories and requests for production to DOTD, seeking to discover, among other things, all records within DOTD's possession reflecting previous train accidents at the site for a five-year period, accident reports, other records relating to the scene in question, average daily traffic counts and miscellaneous design criteria. DOTD made a § 409 objection and also objected to several requests as unduly broad and burdensome.

Plaintiffs filed a motion to compel. The trial court ruled that § 409 only protects information compiled specifically for use in a planned or pending highway improvement project. Since a DOTD witness testified that there were no specific plans to improve or reconstruct the intersection at issue, DOTD had to comply with the majority of plaintiffs' requests. The court held that DOTD need not respond to several interrogatories and requests for production of documents which delved into planned improvements at other intersections.

The courts of appeal denied writs in each case. All parties applied for supervisory writs, which were granted to address § 409's effect on Louisiana civil procedure.

LAW

Plaintiffs argue that disposition of this dispute should be determined solely by state law. Louisiana Code of Civil Procedure Articles 1422 through 1425 govern the scope of

discovery for Louisiana civil trials. In general, parties may discover any relevant, nonprivileged material, which is either admissible or reasonably calculated to lead to admissible evidence. LSA C.C.P. art. 1422. For admissibility, evidence must be relevant and not excluded by other positive law. LSA C.E. art. 402. Plaintiffs assert that the information at issue is relevant and admissible to show the dangerous condition of the accident sites and to show actual or constructive knowledge on the part of DOTD. *Dill v. DOTD,* 545 So.2d 994, 996 (La. 1989); *Lee v. Missouri Pacific R. R. Co.,* 540 So.2d 287, 292 (La. 1989).

Despite the State's substantial interest, § 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. art VI, cl. 2; *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel,* 607 So.2d 549 (La. 1992). See also *Clasphill v. Missouri Pacific Railroad Company,* 793 S.W.2d 139,140 (Mo.banc 1990).

Since preemption is never presumed, § 409 must be construed restrictively to prohibit only what is expressly proscribed. *Rath Packing Co.,* 430 U.S. at 525. Nevertheless, DOTD correctly asserts that the *Wiedeman* trial court unduly limited the statute's scope. While the trial court correctly interpreted the latter part of § 409 as protecting documents involving an actual construction project, the court failed to consider the remaining documents shielded by § 409, namely, those compiled "pursuant to sections 130, 144, and section 152 of this title." These three sections impose certain inves-

tigative and reporting requirements on states participating in federal highway aid programs.

23 U.S.C. § 130 requires that participating states "conduct a survey of all highways" to identify hazardous railroad crossings, and "establish and implement a schedule" of corrective projects. 23 U.S.C. § 144 requires that states "make application to the Secretary for assistance in replacing or rehabilitating . . . highway bridge[s]" which are eligible for aid under a priority system established in cooperation with the Secretary.

Section 152, relative to highway improvements, requires that participating states "maintain an engineering *survey* . . . assign *priorities* . . . and implement a *schedule* of projects." It mandates "an evaluation process . . . which shall develop *cost-benefit data.*" Finally, states must "*report* to the Secretary of Transportation" on an annual basis. 23 U.S.C. § 152 (emphasis added). Section 409 incorporates § 152 (by reference) and protects the compiled documents from use in civil trials. *Beecher,* 607 So.2d at 549. Thus, in addition to determining whether an item of evidence was compiled "for the purpose of developing any highway safety improvement project," the trial court must decide whether the item is one of those enumerated in § 152.

DOTD argues for an even more expansive interpretation that would protect data and raw facts as well as the written documents incorporating the data. DOTD essentially asks this Court to transform a statute, which by its literal wording protects information *compiled* for certain purposes, into one which protects all information in DOTD's possession. We refuse. The word "compiled" indicates that information is collected into one document or composed from other sources.

[*See Webster's New Collegiate Dictionary* p. 230, (1977).] The term suggests an end product, something more than unedited factual material. Moreover, privileges derogate from the system by which courts determine the truth and should not be expansively construed. *United States v. Nixon,* 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974). Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations.

In so holding we are mindful that § 409 forms part of a comprehensive federal plan to promote highway safety. See 23 U.S.C. § 402. Little can be gleaned from the statute's sparse legislative history [*see* H.Conf.Rep. No. 100-27, *reprinted* in 1987 U.S.Code Cong. & Admin. News 66, 156-157], but one court has reasonably concluded that § 409 was enacted "to facilitate candor in administrative evaluations of highway safety hazards." *Duncan v. Union Pacific Railroad Co.*, 790 P.2d 595, 597 (Utah App. 1990). A rule which requires DOTD to divulge source data but not the end product fosters candor by shielding the state's self-critical evaluations and conclusions from outside scrutiny. It also accords with Louisiana's strong interest in fully and fairly adjudicating matters before its courts and the concomitant need to facilitate open and evenhanded development of the facts underlying a dispute.

To recapitulate, the following are discoverable and admissible:

(1) accident reports;

(2) traffic counts; and,

(3) other raw data collected by the Department.

The following are not:

(1) surveys to identify hazardous railroad crossings and improve them (§ 130);

(2) applications for federal assistance in replacing or rehabilitating highway bridges (§ 144);

(3) studies assigning priorities and schedules of projects for highway improvement (§ 152); and,

(4) other compilations made for developing highway safety construction projects which would utilize Federal-aid funds (§ 409).

Plaintiffs Wiedman and Falcon argue that the discovery prohibition, added to § 409 in 1991, should not be applied retroactively to their cause of action which arose in 1989. A change in federal procedural law applies retroactively, absent a contrary legislative mandate or manifest injustice. *Bradley v. School Board of Richmond,* 415 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476, 488 (1974). Section 409 does not indicate that it was meant to apply only prospectively. Manifest injustice does not result since plaintiffs may access the underlying facts which might prove their claim.

CONCLUSION

For the foregoing reasons, the rulings of the trial court are vacated and the cases are remanded for further action in conformity with this opinion.

RULINGS VACATED AND CASES REMANDED.

SUPREME COURT OF LOUISIANA

NO. 93-CC-1314

ANTHONY R. WIEDEMAN, JR.

Versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL.

c/w 93-CC-1318

DERYL A. FALCON

Versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION

c/w 93-CC-1352

ROGER CONNER AND MONA CONNER

Versus

LARRY W. LAIRD, ET AL.

ON WRIT OF REVIEW
TO THE COURTS OF APPEAL,
FIRST AND THIRD CIRCUITS,
STATE OF LOUISIANA

KIMBALL, Justice, concurring.

I concur in the opinion but write additionally to note that in my opinion, the majority's statement concerning the discoverability and admissibility of accident reports, traffic counts, and other raw data collected by the Department should be construed to refer only to the discoverability and admissibility of such information under 23 U.S.C. § 409.

APPENDIX B

Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
Pascal F. Calogero, Jr.
Associate Justices
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Pike Hall, Jr.
Catherine D. Kimball
Revius O. Ortique, Jr.
Clerk of Court
Frans J. Labranche, Jr.

301 Loyola Ave., 70112

Telephone 504-568-5707

January 6, 1994

Hon. Richard P. Ieyoub
Attorney General

Ronald A. Seale, Esq.
Special Assistant Attorney
SEALE, SMITH, ZUBER
& BARNETTE

Terry J. Manuel, Esq.
Special Assistant Attorney

Steven R. Giglio, Esq.
KLEINPETER,
SCHWARTZBERG &
STEVENS

Norman P. Foret, Esq
MCBRIDE FORET, ETAL.
Pat LeBlanc, Esq.
BERNARD, CASSISA, ETAL
Mark M. Dennis, Esq.
Attorney at Law

Jack Roethele, Esq.
FAYARD, HARRIS,
ROETHELE &
HONEYCUTT
Donna Adorna, Esq.
DEPARTMENT OF
HEALTH & HOSPITALS

Re: Anthony R. Wiedeman, Jr.
vs. Dixie Electric Membership. Corp.
No. 93-CC-1314 C/W 93-CC-1318
C/W 93-CC-1352

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

This judgement is now final. By copy of this letter we are advising both the trial court and appellate court of the finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very truly yours,
s/ Frans J. Labranche, Jr.
Clerk of Court

FJLJr:vrc
Enclosure
ccs: Hon. Stranley Lemoine, Clerk
Hon. Lucius W. Patterson, Clerk
Hon. Robert H. Morrison, III

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #003

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 6th day of January, 1994, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING GRANTED WITH ORDER:

93-C - 0493 THOMAS FUTCH V. COMMERCIAL UNION INSURANCE CO., ET AL
(Parish of Orleans)
See Per Curiam.
CALOGERO, C.J. - not on panel.
MARCUS, J. - would grant a rehearing.

REHEARINGS DENIED:

91-KA-0998 STATE OF LOUISIANA V. NATHANIEL ROBERT CODE, JR. (Parish of Caddo)
CALOGERO, C.J. – not on panel.

93-C-0445 BOBBIE J. RIDENOUR AND BRENDA RIDENOUR V. WAUSAU INSURANCE COMPANY AND SIDNEY WEBRE
(Parish of East Baton Rouge)
WATSON, J. – would grant a rehearing.
ORTIQUE, J. – not on panel.

93-C-0813 CARROLL LEBLANC, Wife of/and GERALD CONSTANCE AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC. V. STATE OF LOUISIANA, THROUGH THE

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, OFFICE OF HIGHWAYS, PEPPER & ASSOCIATES, INC. T.L. JAMES AND COMPANY, C.A.A. AND LOUISIANA PAVING, INC. (Parish of Jefferson)
WATSON, J. – not on panel.
ORTIQUE, J. – would grant a rehearing.

93-C-1276 — SCOTT YOUNT AND ROYCE YOUNT v. JOHN MAISANO, DR. JOSEPH V. MAISANO, INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, WILLIAM MAISANO AND WILLIAM MAISANO; BUELAH POMMELS, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, CHARLES POMMELS AND CHARLES POMMELS AND UNITED SERVICES AUTOMOBILE ASSOCIATION (Parish of Jefferson)
ORTIQUE, J. – not on panel.

93-CC-1314 C/W 93-CC-1318 — ANTHONY R. WIEDEMAN, JR. v. DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL C/W DERYL A. FALCON v.DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL (Parish of Livingston)

CW 93-CC-1352	ROGER CONNER AND MONA CONNER v. LARRY W. LAIRD, ET AL (Parish of Calcasieu) CALOGERO, C.J. – not no panel.
93-CA-1348	AMERICAN WASTE & POLLUTION CONTROL v. ST. MARTIN PARISH POLICE JURY, ET AL (Parish of St. Martin) WATSON, J. – not on panel. not on panel. HALL, J. – notes to grant.
93-C-1355 C/W 93-C-1459	JOHNNY STAPLETON, AND JUDY STAPLETON V. GREAT LAKES CHEMICAL CORPORATION, MAX HENDERSON, OLD REPUBLIC INSURANCE COMPANY, LOUISIANA INDEMNITY COMPANY, CHRISTINA RENAE BROWN, AND ALLSTATE INSURANCE COMPANY (Parish of Lincoln) KIMBALL, J. – not on panel.

APPENDIX C

Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
Pascal F. Calogero, Jr.
Associate Justices
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Pike Hall, Jr.
Catherine D. Kimball
Revius O. Ortique, Jr.

301 Loyola Ave., 70112

Telephone 504-568-5707

January 12, 1994

Clerk of Court
Frans J. Labranche, Jr.

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Attorney at Law
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Lake Charles, LA 70602

In Re: Wiedeman, Anthony R., Jr.
vs. Dixie Electric Membership. Corp.
Nos. 93-CC-1314, 93-CC-1318 and
93-CC-1352

Dear Counsel:

This is to advise that the Court took the following action on the Motion To Stay Proceedings Pending Application to the U.S. Supreme Court filed in the above entitled matter:

"Stay order denied."

With kindest regards, I remain,

Very truly yours,
s/ Frans J. Labranche, Jr.
Clerk of Court

FJLJr/rtd
ccs: Steven R. Giglio Esq.
John Thomas Roethele Esq.
Donna Adorno Esp.
Norman P. Foret Esq.
Catherine Smith Nobile Esq.
Patricia S. LeBlanc, Esq.

Court of Appeal, First Circuit, Number CW93 0308, CW93 0300 21st Judicial District Court Div. "C" Number 65,508

APPENDIX D

Supreme Court of the United States
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF COURT

AREA CODE 202
479-3011

January 22, 1994

Mr. Ronald Seale
Two United Plaza, Suite 200
8550 United Plaza Blvd
Baton Rouge, LA 70809

Re: Anthony R. Wiedeman, Jr.,
v. Dixie Electric Membership Corporation
Application No. A-592

Dear Mr. Seale:
The application for a stay of judgment pending the filing of a petition for certiorari in the above-entitled case has been presented to Justice Scalia, who on January 22, 1994 endorsed thereon the following:

"Denied
22/I/94
AS"

Sincerely,
WILLIAM K. SUTER, Clerk
s/ Cynthia Rapp
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

APPENDIX E

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

ANTHONY R. WIEDEMAN, JR. NO. 93 CW 0308
VERSUS
DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL

CONSOLIDATED WITH:

DERYL A. FALCON

VERSUS

DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL APR 23 1993

In re: Anthony R. Wiedeman, Jr. and Deryl A. Falcon applying for supervisory writs, 21st Judicial District Court, Parish of Livingston, No. 65508 - Division "C".

WRIT DENIED. This Court declines to exercise its supervisory jurisdiction. The criteria set forth in Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., 396 So.2d 878 (La. 1981), are not met.

VGW
WAE
LAS

COURT OF APPEAL, FIRST CIRCUIT

s/ Karen West
DEPUTY CLERK OF COURT FOR THE COURT

APPENDIX F

ANTHONY R. WIEDEMAN, JR.

VERSUS

DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL

: NUMBER 65, 408, DIVISION "C"
: 21ST JUDICIAL DISTRICT COURT
: PARISH OF LIVINGSTON
: STATE OF LOUISIANA

ORDER

This matter is before the Court on Motion to compel Responses to Discovery filed by plaintiff. Following a hearing, the Court took the matter under advisement, affording the litigants an opportunity to file supplementary memoranda.

Considering the testimony and other evidence in these proceedings, and for written reasons this day assigned:

IT IS ORDERED that Interrogatories Nos. 9 and 10 as propounded by plaintiff to the Department of Transportation and Development, and Request for Production No. 6 are privileged and need not be answered.

IT IS FURTHER ORDERED that the Department of Transportation and Development fully and completely answer all other interrogatories and respond to all of the requests for production within thirty (30) days from the date of this order.

In as much as the Court has upheld, in part, some of the

objections to discovery filed by the Department of Transportation and Development, no costs or attorney's fees will be assessed in this proceeding.

LIVINGSTON, LOUISIANA, this 2nd day of February 1993.

S/ ROBERT H. MORRISON III, JUDGE
21ST JUDICIAL DISTRICT COURT
DIVISION "C"

21st JUDICIAL DISTRICT
PARISH OF LIVINGSTON, LA
A TRUE COPY OF THE ORIGINAL
This February 3, 1993
s/ Lucius Patterson
Clerk of Court
s/ Brenda Day
Deputy Clerk

ANTHONY R. WIEDEMAN, JR.

VERSUS

DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL

: NUMBER 65, 408, DIVISION "C"
: 21ST JUDICIAL DISTRICT COURT
: PARISH OF LIVINGSTON
: STATE OF LOUISIANA

REASONS FOR JUDGMENT

This matter is before the Court on motions to compel responses to discovery in the form of interrogatories and requests for production. The suit is one for personal injuries in which plaintiffs contend that both the Louisiana Department of Transportation and Development ("DOTD") and another defendant are liable. The alleged basis of liability of the DOTD is the condition of the roadway at the time of the accident. A companion motion to compel as to the co-defendant has been otherwise disposed of. With respect to the objections to discovery filed by DOTD, the matter was taken under advisement with the opportunity for both sides to further brief the matter.

Basically, the DOTD has objected to discovery on the ground of 23 USC 409. This statute, as amended in 1991, reads as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections

> 130, 144, and 152 of this title or for the purpose of development any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Evidence was adduced at the hearing on the motion to compel. A witness for the DOTD testified that, while there were no immediate plans for any construction or improvement on the highway or intersection in question, that the DOTD was always looking for Federal funds, that the road or intersection might be improved in the future, and that, if such were the case, the DOTD would seek Federal funds, based in part on information compiled from prior accidents, etc.

Based on its contention of privilege under 23 USC 409, the DOTD has refused to answer interrogatories concerning daily traffic counts at the intersection, or the production of any accident reports, inspection reports, maintenance reports, specifications and design criteria for warning signs and traffic control devices, planned or pending changes in the specifications in design, copies of all claims or lawsuits involving motor accidents at the site, reports, written statements or other written tangible involving any accident at the site, documents or other evidence intended to be relied upon at trial, or work orders for review of traffic control devices at the intersection.

The issue of this claimed privilege has been dealt with by the Louisiana Courts, under the provisions of 23 USC 409 prior to amendments made to that statute in December of 1991. Prior to those amendments, the wording of the statute

was identical except that the statute said that such reports, surveys, etc., could not be admitted into evidence in a court proceeding. The 1991 amendment added a phrase making this information not subject to discovery *or* admitted into evidence.

The Louisiana Supreme Court, in Beecher v. Keel, No. 92-CC 2788, granted writs in that case, and held that the Trial Court must address the admissibility of each item of evidence as it is offered in accordance with the criteria of 23 USC § 409. The Court stated:

> If the Trial Court finds that the data were compiled pursuant to 23 USC § 152, "or for the purpose of developing any highway safety construction project which may be implemented utilizing Federal-aid highway funds," they shall not be admitted into evidence.

The First Circuit likewise dealt with the statute in the decision in *Martinolich v. Southern Pacific Transportation Company*, et al, 532 So.2d 435 (La. App. 1st Cir. 1988). This case held that while such evidence might not be admissible at trial, under Louisiana rules of discovery, if the information sought might lead to other discoverable evidence, the information was subject to discovery. The Court carefully considered the nature of privileges as ". . . the exceptions to and in derogation of the system by which we determine the truth, and cannot be lightly created or expansively construed."

Obviously, under the provisions of R.S. 9:2800, a litigant in a highway case must be able to prove that the DOTD had actual or constructive notice of a particular vice or defect causing the damage prior to the occurrence in order to recover. As a practical matter, if the DOTD is allowed to hide behind a veil of secrecy under the provisions of 23 USC 409

in all cases, regardless of whether there are any actual construction or improvement projects on the drawing boards, this burden of proof could likely be satisfied only under exceptional cases of good luck on the part of counsel obtaining other isolated fragments of evidence from other sources. This Court does not consider this to be the intent of 23 USC 409.

A practical reading of this statute dictates that construction must be limited to incidents of actual "reports, surveys, schedules, lists, or data compiled *for the purpose* of identifying, evaluating or planning the safety enhancement of accident sites" or for developing highway safety construction improvement projects. This is analogous to a work product privilege, or to the argument that evidence of subsequent remedial measures should not be admissible in products liability cases because of a potential chilling effect on research and development to make products safer. The highway department should not be penalized for trying to develop plans to improve a highway by having those plans turned against it in litigation. However, as is apparently the case in the present situation, there are no specific plans for any improvement or reconstruction of this highway or intersection. Any report or accident lists may conceivably at some point in the future be used for an eventual plan for reconstruction or improvement, but, absent evidence that they were specifically being compiled for that purpose, this Court cannot find that they should be extended the privilege provided by 23 USC 409.

In examining the specific interrogatories and requests for production, the Court notes that Interrogatories Nos. 9 and 10 ask for a listing of location and dates of modifications or removal of island structures at T-intersections for specified highway types performed by the DOTD. The Court will hold

that this information is protected under the Federal statute and need not be responded to.

Likewise, Request for Production No. 6 asks for planned or pending changes in the specifications and design criteria relative to Requests 3 and 4. The Court hold that this matter is privileged, under the Federal statute, and no response need be made.

All other interrogatories and requests are ordered answered as being non-privileged.

Livingston, Louisiana, this 2nd day of February, 1993.

S/ ROBERT H. MORRISON, III, JUDGE
21ST JUDICIAL DISTRICT COURT
DIVISION "C"

21st JUDICIAL DISTRICT
PARISH OF LIVINGSTON, LA
A TRUE COPY OF THE ORIGINAL
this February 3, 1993
s/ Lucius Patterson
Clerk of Court
s/ Brenda Day
Deputy Clerk